

IP 96-0131-CR 1 H/F US v Deem
Magistrate Kennard P. Foster

Signed on 10/24/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Cause No. IP 96-131-CR-01 (H/F)
)	
MARK DEEM,)	
)	
Defendant.)	

MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION

This matter is before the undersigned U. S. Magistrate Judge pursuant to the Order entered by the Honorable David F. Hamilton, Judge, on October 20, 2005, designating this Magistrate Judge to conduct hearings on the Petition for Summons or Warrant for Offender Under Supervision filed with the Court on October 19, 2005, and to submit to Judge Hamilton proposed Findings of Facts and Recommendations for disposition under Title 18 U.S.C. §§3401(i) and 3583(e). All proceedings were held on October 24, 2005 in accordance with Rule 32.1 of the *Federal Rules of Criminal Procedure*. Mr. Deem appeared in person with his appointed counsel, William Dazey, Office of the Indiana Federal Community Defender. The government appeared by Josh Minkler, Assistant United States Attorney. U. S. Parole and Probation appeared by Dwight Wharton, U. S. Parole and Probation officer, who participated in the proceedings.

On October 24, 2005, the Court conducted the following procedures in accordance with Rule 32.1(a)(1) *Federal Rules of Criminal Procedure* and Title 18 U.S.C. §3583:

1. William Dazey, Office of Indiana Federal Community Defender, was present and appointed by the Court to represent Mr. Deem in regard to the pending Petition for Revocation of Supervised Release.

2. A copy of the Petition for Revocation of Supervised Release was provided to Mr. Deem and his counsel. The Magistrate Judge summarized the specifications of the alleged violations and, further, Mr. Deem and his counsel informed the Court that they had read and understood the specifications of violations and waived further reading thereof.

3. Mr. Deem was advised of his right to a preliminary hearing and its purpose in regard to the alleged specified violations of his supervised release contained in the pending Petition.

4. Mr. Deem would have a right to question witnesses against him at the preliminary hearing unless the Court, for good cause shown, found that justice did not require the appearance of a witness or witnesses.

5. Mr. Deem had the opportunity to appear at the preliminary hearing and present evidence on his own behalf.

6. If the preliminary hearing resulted in a finding of probable cause that Mr. Deem had violated an alleged condition or conditions of his supervised release set forth in the Petition, he would be held for a revocation hearing before the undersigned Magistrate Judge, in accordance with Judge Hamilton's designation entered on October 20, 2005.

7. Mr. Dazey stated that Mark Deem would stipulate there is a basis in fact to hold him on the specifications of violations of supervised release set forth in the Petition. Mr. Deem executed a written waiver of the preliminary examination, which was accepted by the Court.

8. Mr. Deem, by counsel, stipulated that he committed specifications of violations set forth in the Petition for Warrant or Summons for an Offender Under Supervision, filed with the Court as follows:

<u>Violation Number</u>	<u>Nature of Noncompliance</u>
1	The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
2	The defendant shall reside at the Volunteers of America (VOA) Community Corrections center for up to 120 days, and shall observe the rules of that facility.

On September 7, 2005, Mr. Deem's conditions were modified to include 120 days halfway house placement due to his ongoing cocaine usage (please see Request for Modifying the Conditions of Supervision dated September 2, 2005). The defendant surrendered to VOA on September 19, 2005, and submitted a urine specimen that tested positive for cocaine. He was subsequently placed on lockdown status for approximately two weeks for punitive and detoxification purposes. On September 26, 2005, Mr. Deem submitted a urine specimen that tested negative for the presence of drugs. On October 1 and 11, 2005, he submitted urine specimens that tested positive for cocaine. Due to the gross violation of facility rules (i.e. abstain from illegal drug use), the defendant was again placed on lockdown status. VOA staff indicated Mr. Deem is being terminated from their program because of his ongoing drug use.

The Court placed Mr. Deem under oath and directly inquired of Mr. Deem whether he admitted violations of the specification of his supervised release set forth above. Mr. Deem stated that he admitted the above violations as set forth. The Court now finds there is a basis in fact for his admissions and accepts same.

Counsel for the parties further stipulated to the following:

- 1) Mr. Deem has a relevant criminal history category of VI, U.S.S.G. §7B1.4(a).

2) The most serious grade of violation committed by Mr. Deem constitutes a Grade B violation, pursuant to U.S.S.G. §7B1.1(b).

3) Pursuant to U.S.S.G. §7B1.4(a) upon revocation of supervised release, the range of imprisonment applicable to Mr. Deem is 21-27 months.

4) The parties did not agree, that upon revocation, what the appropriate disposition of the case would be.

9. The defendant, by counsel, and the government each presented evidence regarding appropriate disposition of the case.

The Court, having heard the evidence and/or arguments of the defendant and his counsel, and the government, now finds that Mr. Deem violated the conditions of supervised release as delineated in the Petition to Revoke his supervised release.

Mr. Deem's supervised release is therefore **REVOKED** and he is sentenced to the custody of the Attorney General or his designee for a period of 15 months. The Court recommends that the defendant be subject to the Bureau of Prison's extensive drug treatment program during commitment. Upon completion of his sentence, he will be subject to a period of five years of supervised release, under the same conditions previously imposed at sentencing.

The Magistrate Judge requests that Mr. Wharton, U. S. Parole and Probation Officer, prepare for submission to the Honorable David F. Hamilton, Judge, as soon as practicable, a supervised release revocation judgment, in accordance with these findings of facts, conclusions of law and recommendation.

Counsel for the parties and Mr. Deem stipulated in open court waiver of the following:

1. Notice of the filing of the Magistrate Judge's Report and Recommendation;
2. Objection to the Report and Recommendation of the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §636(b)(1)(B); Rule 72(b), *Federal Rules of Civil*

Procedure, and S.D.Ind.L.R.72.1(d)(2), *Local Rules of the U.S. District Court for the Southern District of Indiana*.

Counsel for the parties and Mr. Deem entered the above stipulations and waivers after being notified by the undersigned Magistrate Judge that the District Court may refuse to accept the stipulations and waivers and conduct a revocation hearing pursuant to Title 18 U.S.C. §3561 *et seq.* and Rule 32.1 of the *Federal Rules of Criminal Procedure* and may reconsider the Magistrate Judge's Report and Recommendation, including making a *de novo* determination of any portion of the Report or specified proposed findings or recommendation upon which he may reconsider.

WHEREFORE, the U. S. Magistrate Judge **RECOMMENDS** the Court adopt the above recommendation revoking Mr. Deem's supervised release and the sentence imposed of imprisonment of 15 months in the custody of the Attorney General or his designee; and that the defendant be subject to the Bureau of Prisons' extensive drug treatment program during commitment; and at the conclusion of Mr. Deem's incarceration, that Mr. Deem be subject to five years of supervised release under the same conditions previously imposed at sentencing.

IT IS SO RECOMMENDED this 24th day of October, 2005.

Kennard P. Foster, Magistrate Judge
United States District Court
Southern District of Indiana

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